Australian Government
Attorney-General's Department

22/01/2016

Submission of the Attorney-General's Department

Senate Legal and Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015

Introduction

The Attorney-General's Department ('the department') thanks the Senate Legal and Constitutional Affairs Legislation Committee ('the Committee') for the opportunity to make a submission to its inquiry into the Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015 ('the Bill'). On 3 December 2015, the Senate referred the Bill to the Committee for inquiry and report.

The department has had the benefit of reviewing other submissions made to the Committee. To assist the Committee's consideration, this submission provides additional explanation about issues raised in other submissions about Schedules 1, 2 and 4 of the Bill.

This submission is provided to supplement the information contained in the Explanatory Memorandum to the Bill. In preparing this submission, the department has consulted with the Australian Federal Police ('AFP') about issues relating to Schedules 1 and 2.

Schedule 1 – Proceeds of crime

The Committee has published six submissions commenting on the proceeds of crime amendments contained in Schedule 1. The Police Federation of Australia and Victorian Director of Public Prosecutions support the measures in strengthening the Commonwealth proceeds of crime regime. Other submissions comment more generally on the non-conviction based forfeiture regime under the *Proceeds of Crime Act 2002* ('POC Act').

The department notes that the Law Council of Australia ('LCA') and the Australian Human Rights Commission ('AHRC') do not support the Schedule 1 amendments. The following information will focus primarily on the concerns raised in these two submissions.

Context for amendments

The POC Act was enacted as part of reforms to the Commonwealth proceeds of crime regime in 2002. The inclusion of the non-conviction based forfeiture scheme followed the findings of the 1999 ALRC Report entitled *Confiscation that counts*, which concluded that Commonwealth conviction-based laws were inadequate.

The specified objects of the POC Act (as outlined in section 5 of the Act) include: preventing crime by diminishing the capacity of offenders to finance further criminal activity and capitalise future criminal ventures; deterring criminals by reducing actual and expected profitability to redress the unjust enrichment of those who profit at society's expense whilst remaining removed from criminal activity; and compensating society for the harm caused by criminal activity.

The POC Act's non-conviction based forfeiture scheme is one of a range of tools developed to meet these objects. The POC Act also allows for conviction-based forfeiture, literary proceeds orders and unexplained wealth orders. Non-conviction based forfeiture allows for the restraint and recovery of proceeds of crime without conviction or charge, where a court is satisfied, to the civil standard, that the assets are proceeds or instruments of crime.

Applications for non-conviction based forfeiture under the POC Act are made by proceeds of crime authorities: the AFP or the Commonwealth Director of Public Prosecutions (CDPP). In practice, non-conviction

based forfeiture is undertaken by Criminal Assets Litigation (CAL) in the AFP – the exception is for a very few cases, namely long-standing legacy cases which were already at an advanced stage when the AFP took over the function in 2012. Non-conviction based forfeiture is a vital tool in the fight against serious and organised crime, countering the techniques that senior members of organised crime syndicates use to insulate themselves from criminal prosecution, and disrupting and dismantling serious and organised crime groups. Conviction-based forfeiture and criminal prosecutions are undertaken only by CDPP. This clear role delineation is articulated in a Memorandum of Understanding between CDPP and AFP.

The POC Act already specifically allows POC proceedings to occur where criminal proceedings are on foot. Section 319 of the Act currently provides that a court must not stay confiscation proceedings on the sole ground that criminal proceedings have been instituted or have commenced. This ensures that law enforcement authorities can seek orders in a timely and efficient manner to prevent the liquidation or dissipation of illicit property and other proceeds, in order to meet the objects of the proceeds of crime regime. The proposed Schedule 1 amendments are designed to clarify the operation of the POC Act, including the intersection between criminal and non-conviction based forfeiture proceedings.

In practice, there are often instances where criminal proceedings are being run at the same time as related non-conviction based forfeiture proceedings, and there are a range of circumstances in which a proceeds of crime authority may wish to pursue proceeds of crime while the CDPP is pursuing criminal proceedings. In addition to a scenario where the AFP may seek a forfeiture order against a person who is also facing criminal charges (which may have various degrees of overlap with the POC proceedings), possible scenarios might include:

- where the property of Person 1 is the subject of a forfeiture application and that person is not facing criminal charges but another person (Person 2) connected to the property is subject to criminal proceedings
- where proceeds action is taken against a person (Person 1), and the relevant prosecution authority is also considering criminal charges against that person but has not yet laid charges (or where there is simply the potential for charges to be laid), or
- where the property of Person 1 is the subject of a forfeiture application and that person is not facing criminal charges but where the relevant prosecution authority is considering criminal charges against another person connected to the property (Person 2) but is yet to lay charges.

There is also likely to be a wide range of variation in the possible relationship between the parties involved (whether respondents in the POC proceedings, defendants in the criminal trial or both). As such it is appropriate that any respondent making an application for a stay of their POC proceedings should be required to demonstrate a specific risk of prejudice to the criminal trial if the civil POC matter proceeded, not just the overlap in the subject matter of the two proceedings.

Need for amendments

A key driver for the Schedule 1 amendments is to ensure that non-conviction based confiscation under the POC Act can operate effectively.

The Explanatory Memorandum to the Bill refers to two court decisions in 2015 which have had consequences for the operation of the non-conviction based forfeiture regime. These cases are *Commissioner of the Australian Federal Police v Zhao* [2015] HCA 5 ('*Zhao and Jin*') and*, In the matter of an application by the Commissioner of the Australian Federal Police* [2015] VSC 390 ('*Zhang*'). These have inhibited the AFP's ability to progress non-conviction based forfeiture applications where there are related criminal matters. The proposed Schedule 1 amendments seek to clarify and ensure the effective operation of the non-conviction based forfeiture scheme following these decisions.

A stay of the determination of forfeiture proceedings until related criminal trial(s) are complete may delay the proceeds of crime matter for several years. Such a delay would have a substantial impact on the effective operation of the POC Act - for example, it may compromise the availability of evidence and reduce the efficiency of POC litigation (including restraining orders). There are also flow-on effects, including vast increases in the costs and complexity of the management of restrained assets, and significant delays in forfeiture and realisation of assets into the Confiscated Assets Account ('CAA'), preventing the investment of CAA funds into crime prevention and community safety initiatives.

The amendments have been developed in consultation with key stakeholders, particularly the AFP. Development of the amendments involved careful consideration of how best to ensure the effective operation of the regime while recognising its role in the criminal justice system, legitimate interests and human rights.

Specific issues

Proposed section 319 - grounds on which a stay will not be granted

The department understands that the LCA and AHRC are concerned about proposed subsections 319(2)-(5) and the breadth of the proposed categories of what will not warrant a ground for a stay of proceedings.

The department considers that proposed subsections 319(2)-(5) are an important aspect of the amendments to ensure that a respondent in a POC proceeding must indicate more than a generalised risk of prejudice to support a stay of those proceedings. The alternatives proposed in the LCA and AHRC submissions would not achieve this.

Proposed new section 319 elaborates on the existing section 319, which provides for one ground on which a stay is not to be granted (the fact that criminal proceedings have been instituted). Proposed subsection 319(1) makes clear that there remains a general discretion for the court to grant a stay where it considers that it is 'in the interests of justice' to do so. Proposed subsections 319(2)-(5) specify additional grounds on which the court must not grant a stay of the proceedings.

Courts hearing non-conviction based proceeds of crime matters currently have a general discretion to stay the proceedings. The proposed changes to section 319 would not remove the court's discretion to grant a stay. The effect of proposed subsections 319(2)-(5) would be to limit the 'overarching' discretion of the court under proposed subsection 319(1) in the specified circumstances. By preventing the court from granting a stay on specified grounds, the amendments have the effect of requiring a person seeking a stay of proceedings to explain to the court the risk of prejudice in the circumstances, beyond (for example) a statement that they, or another person, may face charges or may have to give evidence in a related criminal trial at a future date.

As noted above, a stay of POC proceedings creates significant difficulties in the expediency and proper management of POC proceedings, and has a range of significant flow-on implications. As such, a stay should only be granted where it is demonstrably appropriate to do so in the specific circumstances. The proposed amendments also provide guidance to the court that, where other options are available that will preserve a person's right to a fair trial without compromising the non-conviction based forfeiture proceedings, use of these options would be preferable to staying the proceedings. For example, if a respondent wished to submit evidence in the POC proceedings that may also form part of the defence in their criminal trial, a court could make orders to prevent disclosure of the information to others, using the suite of protections available under the POC Act, including proposed new provisions allowing for the court to be closed, existing powers for non-publication orders and limitations on the disclosure and use of certain evidence. The existing powers would be strengthened under the proposed amendments to section 266A by confirming that information cannot be exchanged between authorities where a court has made a non-disclosure order to that effect. In circumstances where a court considers that the combination of these protections will not sufficiently preserve the respondent's right to a fair trial, a stay of the POC proceedings can and should be granted.

If the matters listed in proposed subsections 319(2)-(5) were not prescribed, the department is concerned that a respondent in a POC proceeding may be able to successfully obtain a stay and delay the determination of forfeiture proceedings, by simply claiming there was a risk of prejudice to a related concurrent or subsequent criminal proceeding. The department is concerned that this could occur without the respondent providing particulars, or the claim being tested by an assessment of, for example, the degree of overlap between the civil and criminal proceedings and without the court considering other possible steps to ameliorate the alleged prejudice. The department considers that it is appropriate to require the specific nature of the risk of prejudice being claimed to be tested by the court, especially when considered in light of the inability to progress non-conviction based proceeds of crime applications where a respondent may also face criminal proceedings.

Alternative proposals included in LCA and AHRC submissions

The LCA and AHRC submissions suggest alternative options to address their concerns about proposed section 319:

- The LCA's alternative position is that the provisions directing the court as to when it may not grant a stay of proceedings should be removed and replaced by a general discretion of the court that identifies various factors for a court to consider and weigh.
- The AHRC's alternative position is that the following amendments be made to proposed section 319:
    1. Proposed subsection 319(2) be amended to read 'Unless it would be in the interests of justice to do so, the court must not stay the POC proceedings on any or all of the following grounds:', and
    2. Subsections 319(3) and (4) be deleted.

The department does not consider that these alternatives would achieve the policy intent of the amendments. Both alternatives would remove the effect of proposed subsections 319(2)-(5). As outlined above, the department considers that these proposed subsections are an important aspect of the amendments, and would require evidence to be provided explaining the nature of the risk of prejudice to the person before a stay can be granted.

The alternative proposed by the AHRC would appear to make proposed subsection 319(2) subordinate to subsection 319(1), which would negate the effect of proposed subsections 319(2)-(5).

In its alternative recommendation, the AHRC also proposes that subsections 319(3) and (4) be deleted. These subsections are designed to make clear how the principles for determination of stay applications are to be applied where both forfeiture proceedings and a criminal trial are on foot. These are necessary to require a person seeking a stay to demonstrate to the court more than a generalised risk of prejudice despite the degree of overlap between the two proceedings. Proposed subsection 319(3) operates with paragraph 319(2)(a) to make clear that a stay is not to be granted on the ground of a concurrent criminal proceeding against that respondent, even if the circumstances pertaining to the POC proceedings are (or may be) the same as, or substantially similar to, the circumstances pertaining to the criminal proceedings. Similarly, proposed subsection 319(4) operates with paragraph 319(2)(b) to make clear that a stay is not to be granted to a respondent in POC proceedings on the grounds that there are concurrent criminal proceedings against another person even if the subject matter of the POC proceedings is the same, or substantially similar to, matters at issue in the criminal trial. This deals with the circumstance where, for example, a respondent in forfeiture proceedings was not personally facing criminal charges but there may be a connection between the forfeiture proceedings and the criminal trial of another person.

The department understands that the LCA's alternative position would also, in effect, remove proposed subsections 319(2)-(5), and maintains its view that these are important aspects of the amendments. The department agrees with the LCA that it is important to facilitate a process whereby the court, in an individual POC proceeding, considers and weighs the risk of prejudice to an accused in related criminal proceedings, should this arise. The approach and type of factors suggested by the LCA are included in the proposed new subsection 319(6), which sets out the principles to be taken into account by the court when granting a stay. However, the department notes that this needs to be coupled with the other measures, including proposed subsections 319(2)-(5), in order to meet the intent of the amendments outlined above.

The department notes that the amendments do not require the court to 'ignore' factors which may raise risks of prejudice to an accused person. However, under the amendments, the matters listed under subsection 319(2) would not be the *sole* ground(s) on which a stay is granted.

<u>Proposed section 319A – provisions to allow a court to be closed</u>

The department notes the AHRC's specific concerns that forfeiture proceedings may become closed proceedings as a matter of course. Proposed section 319A provides that a court may order that proceedings under the Act (other than criminal proceedings) be heard, in whole or in part, in closed court if the court considers that the order is necessary to prevent interference with the administration of criminal justice.

The proposed amendments would not require judges to close courts in all POC proceedings, but would give the court the discretion to do so. This would provide an additional option for the court to consider, as a means of protecting a respondent's fair trial rights in any concurrent related or subsequent criminal trial, instead of staying proceedings. The discretion is designed to protect the interests of a respondent, where they are also a defendant in a criminal trial, and ensure that the court may exercise its discretion to protect a respondent's fair trial rights in that criminal trial.

The AFP does not anticipate that a proceeds of crime authority would often, if ever, apply for a court to be closed.

Courts would retain the ability to decide whether closing the court is necessary to prevent interference with the criminal process. A court would also be in a position to ensure that any necessary directions are in place to prevent the leakage of information in a way that might prejudice the criminal trial. The amendments would operate in addition to existing options available to the courts, such as orders governing suppression on reporting, or directions as to the use of evidence once admitted.

Schedule 2 – False dealing with accounting documents

The two new offences of false dealing with accounting documents in Schedule 2 of the Bill implement Australia's obligation as a party to the Organisation for Economic Cooperation and Development (OECD) *Convention on Combating Foreign Bribery of Public Officials in International Business Transactions* (the Convention) to create offences of false accounting for the purposes of concealing or enabling bribes to a foreign public official (Article 8).

The first offence (section 490.1) applies where a person makes, alters, destroys or conceals an accounting document, or where a person fails to make or alter an accounting document that the person is under a duty to make or alter, with the *intention* that the person's conduct would facilitate, conceal or disguise the receiving or giving of a benefit that is not legitimately due, or a loss that is not legitimately incurred. The second offence (section 490.2) applies in the same circumstances as the first offence, but where the person is *reckless* as to whether the benefit or loss would arise. The penalties for the offences are proportionate to the differing fault element structure of each offence.

Tiered structure of proposed offences

Several submissions to the inquiry have commented on the 'tiered' fault element structure of the proposed offences, particularly the use of recklessness in the proposed offence at s 490.2. Both the LCA and Johnson Winter & Slattery Lawyers (JWS) expressed concern at the application of recklessness in the offence at s 490.2. The JWS submission states:

> '… the recklessness threshold under the Commonwealth Criminal Code is not a high threshold. Moreover, it is not a test that is well understood, nor does it apply a concept of "recklessness" that would necessarily be consistent with the common usage of that expression. Conduct concerning accounting documents that is not very much more than carelessness could be criminalised by the new provisions' (p2).

The Australian Securities and Investments Commission (ASIC) submission supports the use of recklessness in the offence at s 490.2.

The department considers that the fault elements in the proposed offences strike an appropriate balance between enforceability of the offences and fairness. The department does not agree with JWS that recklessness is not a high threshold, and that it is not well understood. Recklessness requires proof that the defendant was aware of a substantial risk that the conduct outlined in the offences could have the described outcomes and that, having regard to those outcomes, it is unjustifiable to take that risk.

The 'tiered' fault element structure aims to ensure that the offences are of utility in addressing false dealing with accounting documents, which often occurs in circumstances where it is difficult to establish intention, while at the same time differentiating between differing degrees of culpability. The tiered structure serves as a deterrent and encourages vigilance in maintaining accounting documents. As ASIC noted in its submission, a

tiered approach will also assist in prosecuting proscribed conduct where, due to evidential difficulties, it is not possible to establish the fault element of intention.

A similar approach is taken with the money laundering offences in Division 400 of the Criminal Code (the offences apply a tiered structure spanning intention, recklessness and negligence, with penalties comparable with the proposed penalties for the offences in Schedule 2).

Scope of offences

The LCA and JWS submissions both note that the new offences of false dealing with accounting documents are not confined in their operation to the context of foreign bribery, but apply in a broad range of circumstances where constitutional power permits, as specified in subsection 490.1(2). Both the LCA and JWS consider that this could have unintended consequences. The JWS submission recommends confining the offence to the context of foreign corrupt practices.

The Justice and International Mission Unit, Uniting Church in Australia (UC) recommended that the Bill be amended to include an express obligation on persons to maintain proper accounting records for the purposes of demonstrating compliance with the foreign bribery provisions of the Criminal Code.

In contrast, ASIC supports the broad application of the offences as drafted, noting that they will assist more generally in addressing “false accounting” as a significant and serious form of corporate crime, which ASIC encounters in the course of its enforcement activities.

As noted in the JWS and LCA submissions, the new offences will implement Australia’s obligation under Article 8 of the OECD Anti-Bribery Convention. Article 8 requires state parties to create offences of false accounting for the purposes of concealing or enabling bribes to a foreign public official.

The new offences have been drafted deliberately so that they do not require an explicit link between the conduct of false accounting and the circumstance of foreign bribery. The department considers that to confine the offences to the context of foreign bribery would render them very difficult to prosecute successfully. If the offences were confined to the context of foreign bribery, the prosecution would in effect be required to establish the offence of bribing a foreign public official at section 70.2 of the Criminal Code, in addition to establishing the conduct of false accounting. The department considers that confining the offence to the context of foreign bribery would therefore significantly and unnecessarily limit the efficacy of the offences.

It is appropriate that the offences should be implemented to the extent of the Commonwealth’s constitutional authority. The broad application of the proposed offences will assist to combat the conduct of false accounting in a range of criminal contexts. The offences will target not only bribes to foreign public officials, but all manner of duplicitous payments. By linking the offence to facilitating, concealing or disguising a benefit or loss which is not legitimately due, the offences appropriately criminalise false accounting conduct.

Penalties

The offence at section 490.1 imposes a maximum penalty for an individual of 10 years imprisonment, a fine of 10 000 penalty units ($1.8 million), or both. The maximum penalty for a body corporate is the greater of: (a) 100 000 penalty units ($18 million); (b) (where the court can determine the value of the benefit) three times the value of the benefit obtained by the body corporate and any related body corporate from the offence; and (c) (where the court cannot determine the value of the benefit) 10 per cent of the annual turnover of the body corporate during the 12 months ending at the end of the month during which the conduct constituting the offence occurred. For the offence at section 490.2, to which the lower fault element of recklessness attaches, the penalties are half of the penalties for the offence at section 490.1.

Several submissions to the inquiry raise the issue of the proposed penalties for contravention of the new offences. JWS suggests that while the significant penalties might be justified in relation to foreign—or domestic—corrupt practices, they will not be justified in relation to many of the other examples of conduct that could be caught by the provisions. They consider that the proposed penalties are inappropriately high on the grounds that the proposed offences do not require a nexus with bribery or corruption.

Other submissions support the maximum penalties imposed under the proposed offences. The UC submission notes that the penalties contained in Schedule 2 of the Bill are aligned with those already imposed by the Criminal Code in respect of foreign bribery and considers this to be an appropriate approach. ASIC also supports the proposed penalties. ASIC notes that the applicable maximum penalties for the existing offence of falsifying books in section 1307(1) of the *Corporations Act 2001* of two years imprisonment and/or a fine of 100 penalty units mean that it has often been necessary for ASIC to utilise state or territory offences, including the Victorian false accounting offence in section 83 of the *Crimes Act 1958* (Vic), which attracts a maximum penalty of 10 years imprisonment. The department refers the Committee to the compelling argument that ASIC provides in favour of strong penalties for false dealing with accounting documents in Commonwealth legislation:

> 'In ASIC's submission it is important for a variety of reasons for there to be an effective Commonwealth offence that carries a maximum penalty that reflects the very serious criminality involved in falsifying accounting records. These reasons include:
>
> - the more straightforward nexus between Commonwealth investigative powers (such as those contained in the *Australian Securities and Investments Comission Act 2001* and the search warrant provisions of the *Crimes Act 1914*) and Commonwealth offences
> - the additional legal and administrative requirements imposed when a Commonwealth agency commences a prosecution involving state or territory offences, and
> - the complexities of law that are introduced when a combination of Commonwealth and state or territory offences are jointly tried and/or sentenced' (p 2).

The department considers that the proposed offences should attract heavy penalties to reflect the gravity of white-collar crime. The proposed maximum penalties aim to adequately deter and punish a worst case offence, including repeat offenders. These would only be imposed in the most serious instances of false dealing with accounting documents.

The department notes that the proposed penalties are consistent with comparable offences in other domestic and international jurisdictions. The offence of false accounting at section 83 of the *Crimes Act 1958* (Vic), an offence which does not require any nexus with bribery or corruption, attracts a maximum penalty of

10 years imprisonment for an individual, which is the same maximum term of imprisonment proposed to be imposed for contravention of section 490.1. Under § 78ff of the *Foreign Corrupt Practices Act* (US) (FCPA), body corporates face a maximum financial penalty of USD $25 million for contravention of the obligations under § 78m(b), '[F]orm of report' books, records, and internal accounting; directives'.

Reference to a legal duty in 490.1(1)(a)(ii) and 490.2(1)(a)(ii)

In its submission, the UC refers to the relationship between the proposed offences of false dealing with accounting documents and existing laws in Australia which require corporations (and other business structures) to create and maintain proper accounting records.

In particular, the UC refers to subparagraphs 490.1(1)(a)(ii) and 490.2(1)(a)(ii), which state that a person commits an offence if the person 'fails to make or alter an accounting document that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter'.

The UC is concerned that the inclusion of these qualifying words 'assumes a legally enforceable duty to make or alter an accounting document already exists under Australian law', and notes that this might not be the case (p 8). The UC also states that the reference to this duty is 'unnecessarily equivocal with the consequence that public dissemination of the Bill and its enforcement will be unduly difficult and problematic' (p 8).

As outlined in the EM to the Bill, the reasons for including these words is to ensure that the offence is consistent with the finding of the majority of the High Court of Australia in *Commonwealth DPP v Poniatowska (2011) 282 ALR 200*, that criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform. The department considers that this reference is necessary and is not 'unnecessarily equivocal', as the UC submits.

The EM also notes that the references to a legal duty in subparagraphs 490.1(1)(a)(ii) and 490.2(1)(a)(ii) do not qualify subparagraphs 490.1(1)(a)(i) and 490.2(1)(a)(i) respectively, which provide that a person commits an offence if the person 'makes, alters, destroys or conceals an accounting document'. The department agrees with the UC submission that the proposed offences should harmonise with existing laws in Australia and considers that the application of paragraphs 490.1(1)(a) and 490.2(1)(a) enables this.

Addition of a new paragraph in subsections 490.1(1)(b) and 490.2(1)(b) referring to 'a contravention of a law of the Commonwealth'

The UC suggests that subsections 490.1(1)(b) and 490.2(1)(b) be amended to include a new paragraph (vi) 'a contravention of a law of the Commonwealth' to enable the new offences to harmonise with relevant Australian laws.

In order to establish either of the two new offences, one of a number of circumstances specified in subsection 490.1(2) must exist. One of these circumstances is where the person's act or omission facilitates or conceals the commission of an offence against a law of the Commonwealth (subparagraph 490.1(2)(b)(iv)). The inclusion of this subparagraph facilitates a high degree of harmonisation between the proposed offences and existing Australian laws.

Definition of accounting documents

The LCA and JWS submissions consider that the scope of the definition of 'accounting document' in Item 2 of Schedule 2 of the Bill is broad and captures a wide range of documents. The LCA notes that '… the provisions are widely drawn to cover "accounting documents" (which could cover many documents generated in commercial and financial transactions) (p 10).

Item 2 of Schedule 2 provides the following definition of 'accounting document':

> ***accounting document*** means:
>
> (a) any account; or
> (b) any record or document made or required for any accounting purpose; or
> (c) any register under the *Corporations Act 2001,* or any financial report or financial records within the meaning of that Act.

Paragraphs (a) and (b) of this definition are consistent with the offence of false accounting in the *Crimes Act 1958* (Vic). This wording has been supplemented by paragraph (c), which refers to any register under the Corporations Act, or any financial report or financial records within the meaning of that Act. The department considers that it is appropriate to utilise this definition of 'accounting document' to ensure consistency with the relevant Commonwealth law governing corporations. The scope of the definition reflects the Australian Government's commitment to combatting corruption and bribery in all its forms.

Corporate criminal responsibility

Both the LCA and JWS submissions note that body corporates could be held liable for the contravention of the proposed offences by their employees, where the employee is regarded as a 'high managerial agent' of the body corporate.

The department considers that the corporate criminal responsibility provisions in Division 12 of the Criminal Code provide appropriate protection to body corporates from the attribution of corporate liability for their employees' criminal conduct.

Under Division 12 of the Criminal Code, a legal person (ie a company) can be liable for Commonwealth offences committed by an employee, agent or officer if the company's board or a 'high managerial agent' intentionally, knowingly or recklessly committed the offence, or expressly tacitly or impliedly authorised or permitted the offence. In addition, a company can also be liable if its 'corporate culture' encouraged, tolerated or led to the offence, or if it failed to create and maintain a 'corporate culture' that required compliance with the relevant law. In the case of misconduct involving a high managerial agent, the company will not be liable if it had exercised due diligence to prevent the offence, or the authorisation or permission of the offence.

Schedule 4 – Secrecy and access of AUSTRAC information

Definition of 'foreign law enforcement agency'

The LCA has expressed concern regarding Item 2 of Schedule 4 of the Bill, which provides for a regulation-making power allowing additional international bodies to be included in the definition of 'foreign

law enforcement agency' under section 5 of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). The LCA has proposed that the regulation-making power be subject to a six-month sunset clause, suggesting that this 'would provide law enforcement agencies and the public with assurance that the Parliament will consider the effectiveness of the power and any necessary oversight measures within a definite timeframe. It would also provide those stakeholders with the opportunity to comment further on the necessity and proportionality of the power.'

The department consulted extensively with the relevant affected stakeholders, including the Australian Transaction Reports and Analysis Centre (AUSTRAC), the AFP, and the Australian Crime Commission (ACC), on the necessity and proportionality of the regulation-making power. It is our considered view that the proposed measure is both reasonable and necessary in order to ensure that newly constituted international bodies, in particular those with multijurisdictional law enforcement coordination and cooperation functions similar in nature to INTERPOL and Europol, are able to be listed in future as expediently as possible. Enabling timely and effective cooperation in the investigation of transnational crime will both assist in fulfilling our international obligations to combat money laundering and the financing of terrorism and beneficially affect Australia's relations with foreign countries and international organisations. We further note that as regulations are a disallowable instrument, the prescription of any additional body will be subject to Parliamentary scrutiny. As such, we consider that the imposition of a sunset clause as a means of achieving Parliamentary oversight is duplicative and unnecessary.

Application provision

The LCA has also expressed concern regarding Item 4 of Schedule 4, which clarifies the circumstances in which information obtained under section 49 of the AML/CTF Act is able to be disclosed by entrusted investigation officials. The LCA considers that the application provision relating to Item 4 would create the potential for retrospective effect and recommends that, where reasonable or possible, the public be informed about the scope of such possible uses and disclosures.

The department disagrees with the characterisation of the provision as having retrospective effect. Section 49 of the AML/CTF Act enables certain designated persons to obtain further information and documents by written notice, based on a Suspicious Matter Report, Threshold Transaction Report, or International Funds Transfer Instruction report made under the AML/CTF Act. Section 122 of the AML/CTF Act sets out what such persons may do with section 49 information. Proposed paragraph 122(3)(c) (being the subject of the application provision in question) is intended to clarify existing powers under the AML/CTF Act by making explicit the ability of section 49 information to be disclosed onward by a prescribed official, provided that such disclosure is done for the purposes of, or in connection with, the performance of the duties and functions of their office. The proposed amendment does not seek to retrospectively alter legal rights or obligations; it simply seeks to provide legislative certainty regarding the scope of existing powers under the AML/CTF Act.

Further information on the scope of access to and disclosure of section 49 information is contained in Public Legal Interpretation No. 5 of 2008 - Access to and disclosure of 'AUSTRAC information', published by AUSTRAC and available at: http://www.austrac.gov.au/businesses/obligations-and-compliance/public-legal-interpretations.